2-27-2017

State v. Freeland Respondent's Brief Dckt. 44593

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44593**
Plaintiff-Respondent,	)	
	)	**Twin Falls County Case No. CR42-16-1074**
v.	)	
	)	
SCOTT CAMERON FREELAND,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Scott Cameron Freeland appeals from his conviction for grand theft by possession of stolen property.

Statement Of The Facts And Course Of The Proceedings

The state charged Freeland with unlawful possession of a firearm and grand theft by possession of stolen property, both charges arising out of his possession of a Ruger handgun. (R., pp. 63-64.) Freeland moved for suppression of evidence, contending that officers had unlawfully entered his residence and later unlawfully searched his person. (R., pp. 116-24.)

After a hearing, the district court found the following: Freeland rented a small house on the Maxwells' property, the Maxwells asked him to leave for failure to pay rent and suspected drug activity, and, after they believed Freeland had moved out, the Maxwells entered the small house to clean it. (R., pp. 162-63.) In the house Mr. Maxwell found evidence that Freeland had stolen a Ruger pistol from them, although the pistol itself was not found. (R., pp. 163-64.) Mr. Maxwell called the police, gave the responding officer permission to enter the small house, and showed the officer the evidence of theft and drug use he had found. (R., p. 164.) The officer took pictures, filed a "theft report," and instructed the Maxwells to call police if Freeland returned. (R., p. 164.)

The next day Freeland did return and the Maxwells called the police. (R., p. 164.) The responding officers were informed there was a disturbance and were also informed about the theft report. (R., pp. 164-65.) As they approached,

they "saw Freeland's hands move towards his waist." (R., p. 165.) One of the officers drew his weapon and ordered Freeland to put his hands up. (R., p. 165.) When Freeland complied, the officer lowered his weapon. (R., p. 165.) The other officer went inside the Maxwells' house while the first officer stayed with Freeland. (R., p. 165.) The officer with Freeland saw a bulge in Freeland's sweater and asked Freeland to raise his sweater so he could see Freeland's waistband. (R., p. 165.) The officer did not see a weapon at that time. (R., p. 165.)

When the second officer returned he asked if the first officer had frisked Freeland, and the first officer said he had not. (R., p. 165.) The second officer:

> asked Freeland if he could check Freeland's pockets, and Freeland offered to empty his own pockets. While Freeland was doing so, [the officer] observed "hard black plastic" on Freeland's right hip. [The officer] believed this was a holster and immediately demanded that Freeland turn around with his hands behind his back. [The officer] then frisked Freeland and found a handgun.

(R., p. 165.)

The district court declined to decide if Freeland had a privacy interest in the small house (assuming so without deciding), but found that the officer had implied consent and therefore the search of the small house was constitutional. (R., pp. 166-68.) The district court further concluded that the Ruger handgun underlying both charges was discovered as the result of a legitimate frisk. (R., pp. 168-69.)

Freeland entered a conditional guilty plea to grand theft as part of a plea agreement whereby the state dismissed the unlawful possession charge.

(R., pp. 197, 201, 208; Tr., p. 193, L. 14 – p. 194, L. 25.) Freeland filed a notice of appeal timely from entry of the judgment. (R., pp. 216, 223.)

ISSUE

Freeland states the issue on appeal as:

> Did the district court err when it denied Mr. Freeland's motion to suppress?

(Appellant's brief, p. 9.)

The state rephrases the issue as:

Has Freeland failed to show that the officers lacked reasonable suspicion that he was armed and dangerous, and therefore that the limited search for weapons that revealed the Ruger pistol was unconstitutional?

ARGUMENT

Freeland Has Failed To Show That The Officers Lacked Reasonable Suspicion That He Was Armed And Dangerous

A. Introduction

Freeland asserted in his motion to suppress that officers "impermissibly searched him." (R., p. 117.) The state argued that officers properly searched Freeland after he "voluntarily consented to a search of his person and actually offered to and was engaged in emptying out his pockets which resulted in his jacket moving, whereupon [an officer] saw in plain view the end of a gun holster on the defendant's waistband area." (R., p. 156.) Freeland argued, relying on State v. Henage, 143 Idaho 655, 152 P.3d 16 (2007), that although officers had reason to believe he may have been armed, they had no reason to believe he was dangerous. (R., pp. 120-24; Tr., p. 182, L. 7 – p. 185, L. 2.)

The district court found that officers had reason to believe that Freeland had stolen a handgun from the Maxwells. (R., pp. 164-65.) It found that when officers, responding at night to a disturbance call, encountered Freeland "Freeland's hands mov[ed] towards his waist," causing one of the officers to draw his own weapon. (R., p. 165.) The district court also found that an officer saw a bulge in Freeland's sweater. (R., p. 165.) Finally, the district court found that one of the officers "asked Freeland if he could check Freeland's pockets" and Freeland "offered to empty his own pockets." (R., p. 165.) As he did so, officers observed what appeared to be a holster on Freeland's hip. (R., p. 165.) Officers then frisked Freeland and found the gun in question. (R., p. 165.) The district court distinguished Henage and held that, although the officer's initial suspicions

Freeland was dangerous were "dispelled for a time" by his denial he was armed, observation of a plastic object that officers believed was a holster demonstrated reasonable suspicion that Freeland was dangerous and justified the search. (R., pp. 168-69.)

On appeal Freeland argues "officers started the search of Mr. Freeland's person by having him empty his pockets" and at that time it was unreasonable to believe Freeland "posed a risk of danger." (Appellant's brief, p. 10.) This argument fails on its primary premise: asking consent to search Freeland's pockets was not a search. Because his argument depends on facts contrary to those found by the district court and is contrary to law, Freeland has failed to show error.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, [the appellate court] accepts the trial court's findings of fact that are supported by substantial evidence, but [the court] freely reviews the application of constitutional principles to the facts as found." State v. Faith, 141 Idaho 728, 730, 117 P.3d 142, 144 (Ct. App. 2005).

C. The District Court's Conclusion That Officers Frisked Freeland After Seeing The Holster Is Supported By The Facts And The Law

An officer may, consistent with the Fourth Amendment, "conduct a limited self-protective pat down search of a detainee in order to remove any weapons." State v. Henage, 143 Idaho 655, 660, 152 P.3d 16, (2007) (citing State v. Wright, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). Such searches are

"evaluated in light of the facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances." Henage, 143 Idaho at 660, 152 P.3d at 21 (quotations and citation omitted). The ultimate inquiry is an objective one, which requires the court to consider whether the facts available to the officer would "warrant a man of reasonable caution in the belief that the action taken was appropriate." Id. (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

The Idaho Supreme Court has further held that "[a] person can be armed without posing a risk of danger," such that the mere knowledge that an individual has a weapon is insufficient to justify a frisk; there must also be a basis for concluding the armed individual is dangerous. Henage, 143 Idaho at 660, 152 P.3d at 21. "Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous." State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009). The factors include whether: (1) "there were any bulges in the suspect's clothing that resembled a weapon"; (2) "the encounter took place at night or in a high crime area"; (3) "the individual made threatening or furtive movements"; (4) "the individual indicated that he or she possessed a weapon"; (5) "the individual appeared to be under the influence of alcohol or illegal drugs"; (6) the individual "was unwilling to cooperate"; and (7) the individual "had a reputation for dangerousness." Id. (citations omitted). "Whether any of these circumstances, taken together or by themselves, are enough to justify a [pat] frisk depends on an analysis of the totality of the circumstances." Id.

Applying these factors supports the district court's holding: (1) there were bulges in Freeland's clothing; (2) the encounter took place at night; (3) Freeland made threatening or furtive movements; (4) although Freeland did not indicate he had a weapon, officers saw part of a holster; and (5) although Freeland was superficially cooperative, he lied about having a weapon. (R., pp. 168-69.) The district court concluded this last factor, that Freeland lied about being armed, was a "critical distinction" between this case and cases where the Idaho Supreme Court found no basis for a frisk. (R., p. 169.) Application of the relevant law to the facts found by the district court shows no error.

Freeland argues the "officers started the search of Mr. Freeland's person by having him empty his pockets." (Appellant's brief, p. 10.) This argument fails on the facts and the law. The district court's factual findings were that the officer "*asked* Freeland if he could check Freeland's pockets," Freeland "*offered* to empty his own pockets," and the officer saw the holster and "*then frisked* Freeland and found a handgun." (R., p. 165 (emphases added).) These findings are supported by the evidence and unchallenged[1] on appeal. The district court's factual findings are that the frisk occurred only after officers saw the holster, not when they asked to search Freeland's pockets.

Freeland's argument also fails on the law. Because the facts do not support his argument, and he has not challenged the district court's factual

[1] Merely stating facts contrary to those found by the district court is, the state submits, insufficient to claim, much less show, clear error. See Crosby v. Rowand Mach. Co., 111 Idaho 939, 942, 729 P.2d 414, 417 (Ct. App. 1986) ("The party challenging a judge's finding of fact has the burden of showing clear error.").

findings, Freeland can prevail only if the request to check Freeland's pockets was a frisk as a matter of law. Freeland cites no authority, however, that asking for consent to search is itself a search. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). To the contrary, consent to search is itself an exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted); State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). Freeland's argument that requesting consent to search is itself a search is without merit.

Freeland has failed to show that the district court erred. At the time of the frisk the officers had reasonable suspicion Freeland was armed and dangerous. Freeland's argument that the officers began the search, and therefore needed reasonable suspicion, at the time they requested consent to search his pockets is without factual or legal merit.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Freeland's suppression motion.

DATED this 27th day of February, 2017.

_/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of February, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

_/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd